United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

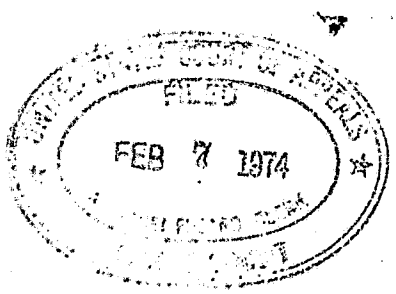
against

ESTYNE WEST,

Petitioner-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING A MOTION UNDER 28 U. S. C. 2255 TO VACATE THE JUDGMENT OF CONVICTION AND ORDER A NEW TRIAL

APPELLANT'S BRIEF



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APPELLANT'S BRIEF

Issue Presented for Review

Whether the motion under 28 U. S. C. 2255 to vacate the judgment of conviction and order a new trial should have been granted, since petitioner's Fourth Amendment rights were violated, in that there was an unconstitutional eavesdropping on a normally toned conversation by an agent deliberately placing his ear to the petitioner's closed apartment door and in that this initial illegality released the spring for inflammatory rebuttal testimony, tainted by the primary illegality, which constitutional

issues were not known to or intentionally abandoned by petitioner or her attorneys, and on which the trial and appellate courts have made no pronouncement, but which issues so affected the conviction as to deny the petitioner the substance of a fair trial.

Statement of Facts

Petitioner-Appellant was charged with a one-count violation of Title 21 U. S. C., Sections 812, 841(a)1 and 841(a)b(1) in that she did possess 11.9 grams of cocaine with the intent to distribute, which cocaine was found on the street beneath her apartment. Petitioner-Appellant went to trial on October 30, 1972, which trial concluded on November 1st, and a jury returned a verdict of guilty on November 2, 1972. Motions for judgment of acquittal and for a new trial were filed on February 13, 1973, and denied on February 26, 1973. Petitioner-Appellant was sentenced on April 4, 1973, to one year imprisonment and to special parole for three years. An appeal to the Second Circuit was timely taken and denied on June 27, 1973, and a writ of certiorari was timely taken to the Supreme Court and denied on October 23, 1973.

On November 16, 1973, the day the petitioner-appellant surrendered herself, a motion pursuant to 28 U. S. C. 2255 to vacate the judgment of conviction and set aside the sentence was filed. The motion was denied in a memorandum decision without a hearing on December 5th. On December 14th an application requesting that petitioner be released on her own recognizance or on bail pending appeal of the district court's decision was made, and said application was denied on December 21st, which denial was endorsed on the memorandum decision. There was an appeal from this denial, and the District Court was upheld by the Second Circuit on January 29, 1974,

but the court directed that the time period allotted to defense counsel and government to file briefs be shortened.

To avoid duplication, the full trial record relating to the initial violation of the Fourth Amendment, the non-electronic deliberate eavesdropping, and the full trial record as to the subsequent product of the initial unconstitutional act, to wit, the inflammatory rebuttal testimony, are both totally detailed in the point below. Briefly, as to the initial eavesdropping, an Agent Hall testified that for five and one-half hours he stationed himself next to the closed door of defendant's apartment, and by placing his ear to the door he heard the word cocaine mentioned a couple of times, although at no time did the defendant and the person in the apartment with her raise their voices. An Agent Korniloff testified that he was with Agent Hall at all times, but he did not put his ear to the door and did not hear anything within the apartment that was being said. An Agent Magro testified that he was in the stairwell and could not hear anything being said within the apartment. The defendant then testified, denying any conversation as to cocaine with the person in her apartment, which denial the trial court held permitted the government, on the issue of credibility, to introduce highly inflammatory rebuttal testimony, which testimony the jury requested be read back to them during their deliberations.

POINT I

The motion under 28 U. S. C. 2255 should have been granted since the petitioner's conviction was affected by the violation of her constitutional rights under the Fourth Amendment in that there was an illegal eavesdropping and in that there was inflammatory rebuttal testimony which evolved from and was tainted by this initial illegality, both of which constitutional violations denied the petitioner the substance of a fair trial and which constitutional issues were not known to or intentionally abandoned by petitioner or counsel so that there was no deliberate bypassing of these constitutional issues on which the trial and appellate courts have made no pronouncement.

The Supreme Court has held that a motion under 2255 is available to a prisoner who claims that her conviction has been tainted by illegally obtained evidence, *Kaufman* v. *United States*, 89 S. Ct. 1068, 394 U. S. 217 (1969). In the instant case, the illegally obtained evidence is demonstrated in a twofold manner:

Firstly, there was the initial violation of the defendant's constitutional right to privacy under the Fourth Amendment, as defined by *United States* v. *White*, 91 S. Ct. 1122, 401 U. S. 745. This initial unconstitutional activity was committed when an Agent Hall testified as to what he illegally overheard by placing his ear to a closed door of the defendant's apartment as he deliberately endeavored to listen to the muffled conversation within that apartment between the defendant and another person who died prior to trial. The testimony of Hall was that although he could not hear sentences, he heard the word "cocaine" mentioned. Two other agents who were with him but did not so position their ears to the door testified they could hear nothing.

Secondly, this testimony necessitated the defendant taking the stand to specifically deny any conversation with the person in her apartment as to cocaine, which very denial, the trial court held, legally permitted the government to introduce highly inflammatory rebuttal testimony, which rebuttal testimony in effect was the subsequent product of the original evidence seized illegally. So that the initial illegal testimony "released the spring" for defendant's denial and the subsequent inflammatory rebuttal testimony. *Harrison* v. *United States,* 392 U. S. 219, 225, 88 S. Ct. 2008, 2011. The exclusion of the illegally obtained testimony and "of any testimony obtained in its wake", *Harrison* N. 10, page 2011, is warranted because of the "imperative of judicial indignation", *Elkins* v. *United States,* 364 U. S. 206, 222, 80 S. Ct. 1437, 1444. The significance of this rebuttal testimony is made manifest by the fact that the jury requested it to be read back to them during their deliberation and that the rebuttal testimony was referred to by the prosecution in summation (Tr. 434).

Firstly, as to the introduction of the initially illegally obtained evidence, it is necessary to quote the testimony on direct examination of Agent Hall in the government's case in chief:

Tr. 26-27:

> Q. Mr. Hall, prior to this search, what did you do when you arrived at the apartment building? A. Myself and one or two other agents took a position outside of the apartment E2E. We were right across most of the time in the hall, the stairway landing and the other agents positioned themselves outside the building.
>
> When I arrived, I listened at the door and heard Estyne West talking with a man and I heard, like, muffled conversation but I recognized her voice and I decided that we will wait——

Tr. 27-28:

> Q. Returning to your testimony, you stated, I believe, that you heard some muffled conversation through the door of Apartment E2E, is that correct? A. Yes.
>
> Q. Did you hear any words? A. Yes, I could hear some words but I couldn't hear any sentences or anything specific.

Tr. 28-29:

> Q. Mr. Hall, what words, if any, do you recall hearing through the door when you were positioned outside the apartment? A. Several times the word cocaine was mentioned by both the male and Miss West.

On Cross-Examination of Agent Hall by trial counsel, Miss Gerling:

> Q. When you got to the apartment, Mr. Hall, where did you station yourself? A. I was in a stairway landing right across from her door.

Tr. 86:

> Q. How long did you stand there in the stairway landing after you first stationed yourself? A. After I first arrived most of the time I spent right next to her door.
>
> Q. Next to her door? A. Right up next to her door.
>
> Q. You put your ear to her door? A. That is right.
>
> Q. Did you say you heard words? A. I heard cocaine mentioned by both of them.
>
> Q. The only word you remember mentioned? A. No it is not.

Q. What other words can you remember? A. I remember names that I heard. I think I remember the name Irving; other names, other words that didn't mean anything to me, but when I heard the names of drugs mentioned they mean something to me, I remember them.

Q. I see. Only you didn't listen to anything but the word cocaine, is that right, so you did not hear it said in any direct sense?

Tr. 88:

A. I stated that I could not give anything in context.

Q. Whoever used the word cocaine raised their voice every time they said it? A. No.

Q. How many times do you say you heard the word cocaine? A. Three or four.

Tr. 90:

Q. How long were you standing there (outside her apartment) before you entered her apartment? A. Approximately five and a half hours.

This testimony, especially Hall's statements that "I listened at the door and heard Estyne West talking with a man and I heard like muffled conversation"; that "I could hear words but I could not hear any statements or anything specific"; that "Several times the word cocaine was mentioned"; that he stationed himself "right up next to her door"; that he answered the question "You put your ear to her door?" with "That is right"; and that he answered the question "Whoever used the word cocaine raised their voice every time they said it?" with the response "No", all this obviously demonstrates that the conversation was not so loud as to deny the expectation

that it be private. As a matter of fact, another agent, Mr. Korniloff, on cross examination in answer to the question, "Did you hear any conversation coming out of that apartment?" stated, "No, m'am." (Tr. 167), even though he responded "Yes" to the question that he was "with Mr. Hall at all times". Also, still another agent, Mr. Magro, in answer to the question, "While you were sitting on the top of the stairwell, did you have occasion to hear a woman's voice at the door at any time?", responded "No!" (Tr. 213). Therefore, the conversation was only heard by Hall, who had put his ear to the door, and it was not loud enough to be heard by the other agents who did not do the same eavesdropping. As to this part of Hall's testimony, relative to his hearing cocaine being mentioned and that when he hears the names of drugs being mentioned they mean something to him, the words of Judge Cardozo in *Shepard* v. *United States,* 290 U. S. 96, 104, are uniquely meaningful: "The reverberating clang of these accusatory words would drown all weaker sounds. It is for the ordinary minds that our rules of evidence are formed."

The long line of cases leading to *United States* v. *White,* 401 U. S. 745, 91 S. Ct. 1122, clearly established that verbal communication is protected by the Fourth Amendment, irrespective of trespass. Thus, Agent Hall's testimony was the inadmissible fruit of an unlawful invasion of a verbal communication and this eavesdropping by deliberately putting his ear up to the door is in effect no different that placing an electronic ear to the outside of a phone booth. *Katz* v. *United States,* 389 U. S. 347, 88 S. Ct. 507. What Agent Hall did was to perpetrate an "unlawful invasion of a constitutionally protected area". *Lopez* v. *United States,* 373 U. S. 438, 439, 83 S. Ct. at 1388. Being in her apartment, the defendant "sought to exclude . . . the uninvited ear". *Katz, supra,* at 352, S. Ct. at 511.

Unlike *United States* v. *Friedland*, 441 F. 2d 855 (2nd Cir. 1971), Estyne West's door was closed, so that the eavesdropping on her conversation was a forbidden invasion of her right to privacy. The straining to hear, behind a closed door, the normally-toned conversation within the defendant's apartment, violated the privacy on which one justifiably can rely. Since this is so in a public telephone booth, it is more than so in one's private apartment. For if in a public phone booth, where "one who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters . . . will not be broadcast to the world", *Katz, supra,* at 352, S. Ct. at 511, *a fortiori* this applies to the defendant's private apartment with a closed door. The two-fold requirement stated by Justice Harlan in his concurring opinion in *Katz* is, "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable". *Katz, supra,* at 361, S. Ct. at 516. Here the actual expectation was not only subjective, but also objective, considering the nature of the locus of the conversation. Mrs. West indeed had an "expectation of privacy" that was not only reasonable but "constitutionally justifiable", *United States* v. *White,* 401 U. S. 745, 752, 91 S. Ct. 1122, 1126, and which "expectation the Fourth Amendment will protect in the absence of a warrant".

Moreover, the uncontested factual pattern in the instant case is diametrically opposed to the factual pattern of *United States* v. *Ortega,* 471 F. 2d 1350, 1361. There the Second Circuit pointed out (1) the alleged illegality was not "related" to the subject matter under question (here the illegality related to eavesdropping on the word cocaine, which is the very subject matter of the indictment); (2) "there had already been one suppression hearing on the subject matter" (here the pretrial motions failed in

discovering this eavesdropping); and (3) no evidence of anything seen or heard by the agent was offered at the trial" (here in fact what was heard was presented at trial).

The *Ortega* court stated that "what can be heard by the naked ear is not protected by the Fourth Amendment" and cited *United States* v. *Llanes,* 398 F. 2d 880 (2nd Cir. 1968). However, the *Llanes* case stated at page 882, "the occupants of the apartment were speaking so loudly that their voices were clearly audible in the hallway", so that the court concluded at page 884, "We believe that conversations carried on in a tone of voice quite audible to a person standing outside the home are conversations knowingly exposed to the public". In the instant case, the testimony obviously does not indicate, according to *Llanes, supra,* at page 882, that the persons in the apartment "were speaking so loudly that their voices were clearly audible in the hallway", especially since the two other agents were in the hallway and testified they could not hear any conversations or words (Tr. 167) (Tr. 213). Thus, the conversation was not "carried on in a tone of voice quite audible to a person standing outside the home . . .". *Llanes, supra,* at 884.

In *United States* v. *Wilkes,* 451 F. 2d 938 (2nd Cir. 1971), at page 940 the court stated that the agent "heard a male voice shouting", so that at page 941, n. 6, the court stated that if the conversation was "loud enough to be audible to the human ear in a public place outside the apartment", then "no Fourth Amendment violation would occur." In the instant case, the occupants in the apartment were not "shouting", because again, the other agents would have heard it, and because of the testimony of the agent who placed his ear to the door testified that he heard like muffled conversation; that he could hear some words, not statements; that he deliberately put his ear to the door and that they did not raise their voices,

so that it is obvious that the conversation was not "so loud as to be audible to the human ear in a public place outside the apartment", and that therefore the defendant had the constitutional expectation of the right to privacy under the Fourth Amendment. It was only because of the agent's deliberate placing of his ear to a closed door and his straining to hear the conversation did the agent pick up the muffled word, cocaine.

The words of Justice Douglas when he stated that "concepts of privacy . . . vanish" if we "slavishly allow an all powerful government . . . to penetrate . . . walls and doors . . .", *White, supra,* at p. 1129, apply uniquely to Estyne West, especially when considered in light of Justice Douglas' remark that "Today no one perhaps notices, because only a small, obscure criminal is the victim. But every person is the victim . . ." *White, supra,* at p. 1129. Former Attorney General of the United States, Ramsey Clark, was quoted by Justice Douglas: "Privacy is the basis of individuality. To be alone and be let alone. To be with chosen company, to say what you think or don't think, but to say what you will is to be yourself. Solitude is imperative, even in a high rise apartment . . . to penetrate the last refuge of the individual, the precious little privacy that remains the basis of individual dignity can have meaning to the quality of our lives that we cannot foresee." *White, supra,* at page 1132.

Secondly, as to the rebuttal testimony which was tainted by the initial illegality: the fruits of the unconstitutional eavesdropping did not end with the testimony of Hall as to what he had overheard. Nor did it end when defendant was compelled to testify in order to deny in her direct any conversation with Bloom about cocaine. "Mrs. West, was any of your conversation with Bloom about cocaine?" "None of it. None at all". and "Did

you and Mr. Bloom at any time mention cocaine?'' ''No.'' (Tr. 314-315). For thereafter, the government asked on cross-examination (Tr. 337-338), ''As I recall you said you never mentioned the word cocaine or coke or anything of that nature during this conversation with him (the deceased Bloom)?'' and the response was, ''No, and we had music on at the same time so I really don't know how Mr. Jeff Hall could pick one word out because that is a fixation of his. No, we didn't mention anything about it But I have heard plenty of mention from him (Hall) about it.'' A further question was asked, ''Was there any discussion of a scheme to bring in a large alleged quantity of cocaine from South America during that conversation?'', and there was an objection and a side bar conference was held.

Mr. Feld stated at the side bar, ''As I understand the defendant's direct testimony the conversation did not concern cocaine with Bloom that night and I am prepared to put on Mr. Hall to testify that she told him that their conversation that night with Mr. Bloom involved a scheme to bring in an alleged quantity of cocaine from South America'' (Tr. 338). When asked by the court why it was not brought out ''in the direct case'', Tr. 339, Mr. Feld replied, ''At the time I didn't know whether she was going to testify to it. I feel that it is a proper matter for rebuttal if she would deny this conversation. She is denying it now on cross-examination and I don't claim I would have a right to bring it out as a result of cross examination but she is not permitted to lie about it.'' Miss Gerling then stated, ''I don't think that is proper rebuttal. On direct examination there was nothing on it and secondly all that was brought out on direct examination was he heard the word cocaine in the apartment that we are talking about.'' The court responded, ''But I understand that it is brought out on direct examination and now he claims that

Hall is going to testify she gave him an account of a lot of things said with Mr. Bloom. There is serious question whether he had a right to bring this out on the case in chief even assuming it was true." (Tr. 340). Finally, the question was allowed and the answer by the defendant was, "No, not during that conversation was a cocaine alleged schemed up or otherwise to be brought any place." The following question was then asked: "Did you ever have a conversation with Mr. Bloom concerning the bringing in of an alleged large quantity of cocaine?" and she responded (Tr. 341), ". . . I am not knowledgeable about grandiose schemes for bringing things into places . . . But I don't know about any scheming, bringing in quantities, large quantities, that is not anything I am engaged in." Thus the government's argument that the defendant, by her direct testimony, denied any conversation as to cocaine with Bloom, the subject matter of which Hall had testified to when he said he overheard the word cocaine being used, was the basis for the rebuttal; that is to say, defendant's denial of the illegally overheard conversation led to the rebuttal.

Thereafter, Agent Hall was called on rebuttal and over objection the court permitted his testimony based on the reason that (Tr. 352), "this seems to me to be entirely valid testimony, discrediting, if it is believed by the jury, her story of what she and Mr. Bloom were discussing and for that purpose which I understand is the only one for which it is offered?"

Agent Hall was then recalled for purposes of rebuttal on this issue and permitted over objection to answer the question, "Will you tell the court and jury what she said to you about her conversation with Sheldon Bloom?" (Tr. 348) and Agent Hall said, "She told me that the primary purpose of her meeting with Mr. Bloom that evening was to discuss a swindle that she had perpetrated on Mr. Bloom and a partner of his in the Sanctuary Night Club (Tr. 350).

"She told me that she swindled them out of $10,000 with a trip down to South America that they had backed her on, with a phony cocaine transaction. She promises them that they would invest a certain amount of money and she would like to multiply it by ten times and I believe she told me that they fronted her, advanced her $5,000, she told me Mr. Bloom went down to South America, she also went to South America.

"She arranged for an introduction between Mr. Bloom and a Maria Lasso, a Spanish woman and her husband, who was a federal fugitive, for an introduction between Mr. Bloom and Maria Lasso.

"She met Mr. Bloom's partner in the Bahamas . . .".

After another objection and after the court stated at the side-bar conference that the testimony was being admitted for the purpose of discrediting defendant's story of what she and Bloom discussed (Tr. 352-353), Agent Hall continued, "Yes, sir. She further told me that she met with a man by the name of Seymour, I don't know his last name. He was the co-owner she told me, of the Sanctuary night-club in Manhattan, a partner of Mr. Bloom's. She had met Seymour and his homosexual lover, a young boy, somewhere in the Bahamas. I believe she said the Bahamas, and at that point she had them help her tape, I think she said, a certain large quantity, 5 kilos of sugar, not cocaine, but sugar on to her body, and she had them believing that it was cocaine and she was going to smuggle it into the United States.

"At the time she met Mr. Bloom in the apartment she told me that she was like holding out for more money and had told him she had stashed the cocaine somewhere else.

"This is what she believed, why we were at her apartment, to seize this cocaine in the swindle she had. She told me several other people was expecting this cocaine to

be coming in and this was the reason, she told me, that she met with Bloom that night at her apartment'' (Tr. 353-354).

Thus the testimony of Hall in the government's case in chief as to what he overheard through the door was given corroboration by the testimony of Hall in rebuttal relative to the South American swindle. This rebuttal testimony was then tainted by the fruit of the initial unlawful act—for the deadly juice of that initial fruit soaked the rebuttal testimony which assisted in poisoning the defendant. The rebuttal testimony relating in lurid details a ''phony cocaine transaction''; ''arranged an introduction with . . . a federal fugitive''; she had met . . . ''his homosexual lover, a young boy'', and ''she was going to smuggle it into the United States''; taping ''sugar on to her body''; all this created an abhorrent image that gave credence to the initial testimony of hearing, with an ear to a closed apartment door, the word cocaine.

This rebuttal testimony is part of the fruit of an unconstitutional search and seizure. For the taste of the initial fruit was still in the mouth of the jury when it was commingled with the rebuttal repast. That this rebuttal testimony was most significant and was considered by the jury is made clear by the very fact that the jury requested it be read back to them for purposes of their deliberation (Tr. 434).

The court in *Wong Sun* v. *United States*, 371 U. S. 471, 484, 83 S. Ct. 407, 416, stated, ''In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524, this court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks* v. *United States*, 232 U. S. 383, 34 S. Ct. 341. The exclusionary prohibition extends as well to the

indirect as the direct products of such invasions. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 40 S. Ct. 182". The rebuttal testimony in the instant case was an indirect product of the invasion. Mr. Justice Holmes, speaking for the court in the *Silverthorne* case, *supra,* at 392, S. Ct. at 183, expressed succinctly the policy of the broad exclusionary rule: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." The court in *Wong Sun, supra,* at U. S. 485, S. Ct. 416, stated: "It follows from our holding in *Silverman* v. *United States,* 365 U. S. 505, 81 S. Ct. 679, that the Fourth Amendment may protect against the overhearing of verbal conversations."

Thus, most significantly, as the court stated in *Wong Sun, supra,* at 487-488, S. Ct. 417, "Rather the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'. Maguire, Evidence of Guilt, 221 (1959)." The rebuttal testimony in this instant case cannot be purged of the primary taint, for its admissibility was based on it. In *Elkins* v. *United States,* 364 U. S. 206, 217, 80 S. Ct. 1437, 1444, the court stated as to the exclusionary rule that it "is calculated to prevent not to repair. Its purpose is to deter—to imply respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Thus, in *United States* v. *Friedland,* 441 F. 2d 855, 861 (2nd Cir. 1971), the Second Circuit said, "Courts must neither so narrow the rule as to impair its presumed deterrent effect

nor expand it in such a way that in order to achieve a marginal increment in deterrence society will pay too high a price."

The "tainted evidence" phrase used by the court in *United States* v. *Schipani,* 414 F. 2d 1262, 1266 (2nd Cir. 1969), is analogously applicable, since the rebuttal evidence indeed was tainted by the initial illegality. This illegal act, the eavesdropping, was "deliberately" done by the agent, *United States* v. *Edmons,* 432 F. 2d 577 (2nd Cir. 1970), and because of that deliberate act the government was able to introduce the tainted rebuttal testimony. The rebuttal testimony has no "independent" basis for its admissibility, for the "source" which authorized its introduction into evidence initially stems from the direct examination of Hall as to his eavesdropping and overhearing the word cocaine which was subsequently denied by the defendant on her direct testimony. *United States* v. *Paroutian,* 299 F. 2d 486 (2nd Cir. 1962).

Thus, the initial illegality and the tainted rebuttal evidence were, according to *Smith* v. *United States,* 416 F. 2d 1255, 1256 (2nd Cir. 1969), "a deprivation of a right so fundamental as to amount to a denial of a fair trial" and to justify that "the conviction and sentence be set aside under 2255." These constitutional allegations are "not insufficient in law, immaterial, vague, conclusory, palpably false or patently frivolous", *United States* v. *Malcolm,* 432 F. 2d 809, 812 (2nd Cir. 1970). Cases cited. Moreover, after "an examination of the record", *Reiff* v. *United States,* 288 F. 2d 887, 888 (9th Cir. 1961), as to the constitutional issues involved here, it is apparent that the appeal in this case is anything but "completely frivolous", *Edwards* v. *United States,* 286 F. 2d 704, 706 (9th Cir. 1961).

Furthermore, as the *Kaufman* court further stated at 1075, "the application of the exclusionary rule is not made to turn on the existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens . . .". Thus, in *Miller* v. *United States*, 357 U. S. 301, 313, 78 S. Ct. 1190, 1197-98, "However much in a particular case insistence upon such rules (observance by law officers of traditional fair procedural requirements) may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of a short cut method in law enforcement impairs its enduring effectiveness . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to receive the protection designed to secure the common interest against unlawful invasion of the house."

All the above epitomizes the significance of what the court stated in *Kaufman* v. *United States*, 394 U. S. 217, 226, 89 S. Ct. 1068, 1074: "The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." The logic of what the court stated in *Sanders* v. *United States*, 373 U. S. 1, 8, 83 S. Ct. 1068, 1073, as to a federal prisoner, is made manifest: "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged". This case epitomizes the reasoning of the court in *Kaufman*, when it stated at page 1075: "the full protection of their constitutional rights requires the availability of a mechanism for collateral attack". Again in *Kaufman*, at 1076, the court did "adopt the reasoning of Judge Wright's dissent in 125 U. S. App. D. C. at 123, 386 F.

2d at 831, where a federal trial or appellate court has had a say on a federal prisoner's claim, there may be no need for collateral litigation. But what if the federal trial or appellate court said nothing because the issue was not raised? . . . What if it is unclear whether the say was on the merits? These problems raise not the issue whether relitigation is necessary, but whether adequate litigation has been offered."

Therefore, the court in *United States* v. *Thompson,* 261 F. 2d 809, 810 (2nd Cir. 1958) stated that a motion under 28 U. S. C. 2255 is "broadly available to correct an injustice in a conviction". In *United States* v. *Coke,* 404 F. 2d 836, 847 (2nd Cir. 1968), the court affirmed *United States* v. *Sobel,* 314 F. 2d 314, 320-323 (2nd Cir. 1962), which stated, "The maximum scope of 2255 was to allow relief to a prisoner (1) if he has shown a significant denial of a constitutional right even though he could have raised the point on appeal and there was no sufficient reason for not doing so; or (2) a defect severely affecting his trial even though not of constitutional magnitude, if it was not correctable on appeal or there were exceptional circumstances excusing the failure to appeal". It is clear in *Coke, Sobel* and *United States* v. *Fisher,* 381 F. 2d 509, 512 (2nd Cir. 1967) that the "exceptional circumstances" do not relate to "the significant denial of a constitutional right", but to a "defect severely affecting" the trial and not of constitutional magnitude. In the instant case, the issue most definitely involves a constitutional right, the Fourth Amendment, the "deprivation" of which did "infect the validity of the conviction", *United States* v. *Duhart,* 269 F. 2d 113, 114 (2nd Cir. 1959), so as to create "the denial of the substance of a fair trial". *United States* v. *Rosenberg,* 200 F. 2d 666, 668 (2nd Cir. 1952).

Unlike the instant case, in *United States* v. *Rosenberg, supra; United States* v. *Walker,* 197 F. 2d 287, 288 (2nd Cir. 1952); *United States* v. *Angelet,* 265 F. 2d 155 (2nd Cir. 1959), the factual circumstances of the alleged illegality were fully known prior to trial and therefore, in not having been timely raised at trial, constituted a deliberate bypassing. Moreover, in all those cases the court nevertheless concluded that the alleged illegality claimed therein was without substance. Most significantly, in *Williams* v *United States,* 463 F. 2d 1183, 1184 (2nd Cir. 1972), again unlike the present case, the court held there was a "deliberate bypassing" especially since the circumstances were fully known by trial counsel through pre-trial motions and there had been a prior determination. In the instant case, not only were the factual circumstances unknown to trial counsel as to the initial illegality and the subsequent product of it, but in petitioner's demand for a bill of particulars, specifically request No. 4, which was granted by the court, the government did not reveal the initial illegality or the subsequent product of it.

Request No. 4 of the bill of particulars was, "Statements alleged to have been made by the defendant in conversations that she participated in." The government's response to this was:

> "(a) All relevant statements made by the defendant or conversations in which she participated prior to the time of her arrest to the extent that they are written or recorded statements or confessions made by the defendant or are contained in reports, memorandum or other internal government documents which purport to reproduce the exact words of the defendant or which purport to set forth the substance of the defendant's remarks in detail and at length and which do not involve privileged matter;

"(b) All post-arrest statements made by the defendant.

"With respect to the items referred to in subparagraph (a) of the preceding paragraph, the Government states that there are none.

"With respect to the items referred to in subparagraph (b) of the preceding paragraph, the Government states:

"(i) Following her arrest, the defendant was interviewed at the New York Regional Office of the Bureau of Narcotics and admitted that she had thrown a package of her cocaine out the window.

"(ii) On March 7, 1972 the defendant was interviewed by an Assistant United States Attorney. A copy of the 'Statement of Defendant Before Arraignment made to Assistant United States Attorney' relating to that interview is submitted herewith."

Thus, neither the initial illegality, the eavesdropping testimony, nor the subsequent product of it, the tainted rebuttal testimony, was revealed in the Government's answer to defendant's demand for a bill of particulars, and thus the unconstitutional activity "was not obvious to the (defendant) at the time of trial". *Rosenberg, supra,* at p. 669.

The *Kaufman* court in Note 8 at pp. 1074-1075 cites *Fay* v. *Noia,* 372 U. S. 391, 439, 83 S. Ct. 822, 849, which case, in defining the "classic definition of waiver", quoted *Johnson* v. *Zerbst,* 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, "an intentional relinquishment or abandonment of a known right or privilege". It is significant to note that the *Noia* court states that this "standard . . . depends on the considered choice of the petitioner", so that even "a choice

made by council not participated in by the petitioner does not automatically bar relief", *Noia, supra,* 372 U. S. at 439, 83 S. Ct. at 849.

In the instant case, there most definitely was no intentional choice by defendant and obviously no "intentional" choice either by trial counsel or by subsequent counsel who submitted the motion for a new trial, for obviously the constitutional right was not "known" by either the defendant or her two prior counsel. If anything, it was an "honest mistake" by prior counsel. *Henry* v. *Mississippi,* 379 U. S. 443, 450, 85 S. Ct. 564, 569. For logic clearly dictates there could be no "reasons for a strategic move", *Henry* v. *Mississippi, supra,* at 451, 85 S. Ct. at 569, so that neither of the two prior attorneys could come within the statement in *Rosenberg, supra,* at p. 670, "Astute counsel decided that (the alleged illegality) did the clients no harm and now want this court to decide otherwise". On the contrary, if petitioner's constitutional rights had in fact been "known", considering the obvious damning impact of the initial illegality, the eavesdropping, and the obvious damning impact of its subsequent product, the inflammatory rebuttal testimony, the total opposite is true; strategy would dictate that there would have been an objection at the trial or that this constitutional issue would have been raised in the prolix motion for a new trial. Therefore, this indicates it was far from "intentional" or far from being "known". As to appellate counsel, "there was a procedural obstacle to the raising on appeal of the question here presented". *Sobel, supra,* at p. 324; to wit, having not been raised below, the constitutional issues were not preserved, and thus the proper procedure was it should not have been raised directly on appeal but collaterally by way of a motion under 28 U. S. C. 2255. The *Kaufman* court, in Note 8, referred to *Henry* v. *Mississippi,* 379 U. S. 443, 450, 85 S. Ct. 564, 569, where unlike here, the

court stated, "the trial attorney deliberately by-passed the opportunity to make timely objection in the" trial court. Obviously here, totally unlike *Henry,* there was no "strategic, tactical or any other reason that can be fairly described as" a "deliberate by-passing".

In conclusion, the constitutional issue as to the initial illegality, to wit, the violation of the defendant's Fourth Amendment right to privacy and the subsequent product, the tainted rebuttal evidence, having not been raised at the trial or in the motion for a new trial, was therefore "not correctable on appeal", *Castellana* v. *United States,* 378 F. 2d 231, 233 (2nd Cir. 1967). Obviously, then, since the issue was not raised before the appellate court, the 2255 motion is not being "employed to relitigate questions which were raised and considered on the appeal". *Castellana, supra,* at p. 237. Considering then that both the trial and appellate courts were unable to specifically decide the issue, *United States* v. *Gordon,* 433 F. 2d 313, 314 (2nd Cir. 1970), they therefore have had "no say" on the issue and thus there is no "deliberate bypassing". *Kaufman* v. *United States,* 394 U. S. 219, 89 S. Ct. 1068, 1074, 1075, N. 8.

Judge Frankel, in his decision, stated that there was a renewal on the attack of the adequacy of trial counsel (Miss Enid Gerling), which attack had been made by subsequent counsel (Sanford Katz), in his motions for a new trial. However, in fact, the issue which was raised in appellate counsel's 16 page motion under 2255, and 4 page reply to the government's answer, was the violation of the petitioner-appellant's Fourth Amendment constitutional rights and the subsequent product of it, to wit, the tainted rebuttal testimony. Only one page in said motion and reply was devoted to the inadequacy of trial counsel, for the sole purpose, to point out how that inadequacy came at a most crucial constitutional juncture in the trial, to wit, when the government violated the defendant's Fourth Amend-

ment rights, Federal Practice and Procedure, Vol. 2, Sec. 594, page 602. Moreover, this specific interrelationship was not brought out by the successor to the trial counsel in the motion for a new trial. Thus, it was brought to the attention of the trial judge in the 2255 motion so that the failure of petitioner's two prior counsel to raise the issue could not be construed as a question of "trial stategy", *United States* v. *Duhart,* 269 F. 2d 112, 115 (2nd Cir. 1959), and thereby considered as a deliberate bypassing. Therefore, the issue of inadequacy of prior counsel was not raised *per se* but *per accidens.*

CONCLUSION

It is respectfully submitted that, since neither the trial nor appellate courts have made a pronouncement on the unconstitutional eavesdropping by a government agent or the subsequent product of this initial illegality, to wit, the tainted rebuttal testimony, which constitutional issues were not known to nor intentionally abandoned by petitioner or her counsel, and that since these issues so affected the petitioner's conviction as to deny her the substance of a fair trial, the petitioner's motion under 28 U. S. C. 2255 should be granted and her judgment of conviction vacated and a new trial ordered

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Petitioner-Appellant.

ADDENDUM

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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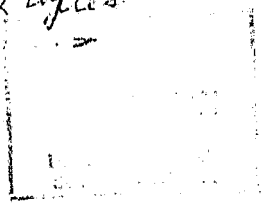

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